

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 145 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE J.R.VORA

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the concerned Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals? : NO

RUPSINGBHAI TERSINGBHAI BHEDI

Versus

STATE OF GUJARAT

Appearance:

MR KB ANANDJIWALA for Appellants

MR HL JANI, APP for Respondent

CORAM : HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 07/10/2004

ORAL JUDGEMENT

1. The present Appeal is preferred under Section 374(2) of the Code of Criminal Procedure, 1973 against judgment and order dated 30th January, 2003, delivered by

Joint District Judge and Additional Sessions Judge, 2nd Fast Track Court, Panchmahal at Dahod, in Sessions Case No. 77 of 2002, by which present appellants are convicted by the learned Trial Judge for the offence punishable under Section 304 Part-II read with Section 34 of the Indian Penal Code, and each of the appellant is sentenced to undergo rigorous imprisonment of five years and to pay fine of Rs. 500/- in default to undergo simple imprisonment for 15 days.

2. Incident in question appears to have occurred during night hours of 12th of September, 2001 and early hours of 13th of September, 2001 at village Jasuni, District Godhra. Deceased Mansingbhai Varubhai Palas, aged about 35 years, resided at village Tarkada-mahudi had married to one Jantaben. Jantaben, wife of deceased Mansingbhai, died before three years of the incident on account of delivery of child. From the marriage of Jantaben, Mansingbhai had five children, out of which, two daughters and three were sons. At the relevant time, eldest son Jignesh, aged about 11 years and one son of third number were studying at Limkheda. Youngest daughter was with Kantibhai, brother of the deceased at Degham, while other daughter, named, as Usha aged about 10 years, was staying with the deceased along with youngest son aged about 5 years. On account of death of Jantaben, wife of the deceased, it was decided that the deceased would re-marry Kokilaben, sister of Jantaben and sister-in-law of the deceased. Parents of Kokilaben consented this relationship. On this account, deceased Mansingbhai was frequently visiting village Jasuni where his in-laws were residing. After some time, the idea of marriage of Kokilaben with the deceased was objected by Hakliben, mother of Kokilaben and four brothers of Kokilaben and, therefore, as per the customs prevailing in their caste, though deceased Mansingbhai had paid Rs. 10,000/- to his parents-in-laws, they were not sending Kokilaben to deceased Mansingbhai. On this account, there was some dispute between Mansingbhai and his in-laws, for which civil as well as criminal litigations also took place between the parties.

2.1 Complainant - Vechatbhai Mavjibhai Palas at that time, serving in Collector Office at Godhra as an Auditor happened to be cousin brother of deceased Mansingbhai. Mother of deceased Somliben was alive when incident took place. On early morning on 13th of September, 2001 at about 5.00 a.m. Sureshbhai Varsing Bhedi and Gulabbhai Bhursing Bhedi, both relations of in-laws of deceased Mansingbhai Palas, visited the house of complainant Mavjibhai Vechatbhai. Both of them conveyed to

Vechatbhai that on last evening, deceased Mansingbhai visited the house of his in-laws at village Jasuni, and at night, his mother-in-law and his brother-in-laws, had beaten deceased Mansingbhai, and his legs were broken. Sureshbhai Varsing Bhedi and Gulabbhai Bhursing both requested Vechatbhai, to shift Mansingbhai in the hospital. On receiving this information, Vechatbhai went to his uncle Harjibhai Kaljibhai Palas and other cousin Limsingbhai Mansingbhai Palas. Thereafter, complainant Vechatbhai, Harjibhai and Limsingbhai, all the three went to village Jasuni on motorcycle and reached at the house of in-laws of deceased Mansingbhai at about 7.00 a.m. They noticed that deceased Mansingbhai was lying on a cot outside in a field owned by P.W.1 Bhursingbhai and his left leg below knee was broken totally and had injuries on left leg also. They noticed that Mansingbhai had other injuries on his body as well. They also found that Mansingbhai was groaning in pain and grief and was requesting the complainant and the others to shift him to hospital. All the three inquired from deceased Mansingbhai that what had happened. Deceased Mansingbhai replied that "on last night, my four brothers-in-law Laxmanbhai, Rupsingbhai, Bharatbhai, Prabhatsingbhai and mother-in-law Hakliben had beaten him with sticks". All the three noticed that Mansingbhai had serious injuries and suffering from severe pain and agony. Out of these three persons, Harjibhai was sent to obtain a vehicle for shifting Mansingbhai in the hospital, but in the meantime, soon thereafter, Mansingbhai had died. Complainant Vechatbhai Palas gave First Information Report before Jhalod Police Station at 13.30 hours on 13th of September, 2001, which was recorded by Senior Police Inspector of Jhalod Police Station PW-7 Jayprakash Dayaljibhai Sutriya, and the crime came to the registered against five appellants. Investigation was entrusted to Jayprakash Sutriya, who visited place of incident, and draw panchnama of place of occurrence and also held inquest of the dead body of the deceased, and thereafter dead body of Mansingbhai was sent to PHC Sanjeli on 14th of September, 2001 at about 6.3.0 a.m or p.m. The Investigating Officer recorded the statements of the relevant witnesses. He forwarded mudammal to Forensic Science Laboratory. Mudammal contained clothes of deceased and piece of wood recovered from the scene of offence, and ultimately, charge sheet was filed in the Court of Judicial Magistrate, First Class, Jhalod, against the appellants for the offence punishable under Section 302 read with Section 34 of IPC. Since the case was triable by the Court of Sessions, the learned Magistrate, committed the case to the Court of Sessions at Panchmahal, where learned Additional Sessions Judge,

Panchmahal Camp at Dahod, framed charges against appellants, vide Exh.2, on 19th of August, 2002.

3. All the appellants pleaded not guilty and, therefore, prosecution tendered the following oral as well as documentary evidence, to prove its case against the appellants, as under :

1. PW-1 Bhursingbhai Nanjibhai Bhedi Exh.10
2. PW-2 Mansingbhai Nanjibhai Palas Exh.18
3. PW-3 Mavjibhai Vechatbhai Palas Exh. 20
4. PW-4 Harjibhai Kaljibhai Palas Exh. 22
5. PW-5 Dr. Rameshchandra Ramlakhan Zha Exh.23
6. PW-6 Limsingbhai Mansingbhai Palas Exh.26
7. PW-7 Jayprakash Dayaljibhai Sutriya Ex.27

The prosecution also produced documentary evidence such as (i) Complaint at Exh. 21, (ii) inquest panchnama at Exh. 11, (iii) panchnama of place of occurrence at Exh. 19, (iv) panchnama of body of the accused Exh. 12 & 13 (v) certificate of cause of death Exh. 14; (vi) Postmortem Note at Exh.24, (vii) certified copies of Complaint of Criminal Case No.459/01 Exh.28 and Certified copy of Complaint of Criminal Case No.810/01 at Exh. 29, (ix) Report received by FSL at Exh. 15, (x) Receipt of Mudammal sent to FSL at Exh. 16 and (xi) Certificate of Power at Exh. 17.

4. Out of 7 witnesses examined by the learned Trial Judge, PW-3 Mavjibhai Vechatbhai Palas Exh.20, PW-4 Harjibhai Kaljibhai Palas Exh.22 and PW-6 Limsingbhai Mansingbhai Palas at Exh.26, are the witnesses, who on receiving the information from Sureshbhai and Gulabbhai, reached at the place of offence and as per the prosecution case, before whom the deceased made declaration that he was beaten by his four brothers-in-law and mother-in-law. Out of these three witnesses, PW-4 Harjibhai Kaljibhai Palas, Exh.22, has not supported the prosecution case.

4.1 PW-3 Vechatbhai Mavjibhai Palas stated in his deposition that he was serving as an Auditor in Collector Office at Jhalod, and was residing at Jitpura . Valbhai Meghabhai Palas was his uncle and had two sons. Out of which, one was Kantibhai and the younger was deceased Mansingbhai. Deceased Mansingbhai had married with Jantaben. Jantaben had died during child birth before three years of the incident. Deceased Mansingbhai had five sons, and on death of Jantaben, it was agreed between the parties that Kokilaben, sister of deceased Jantaben, would marry deceased Mansingbhai. The incident

took place on 12th of September, 2001. On 13th of September, 2001 at about 5.00 a.m. Sureshbhai Varsing and Gulabbhai had been to his house, and they stated that deceased Mansingbhai had been beaten in the house of his in-laws, and had received injuries on his left leg and blood was pouring from the wound. They also requested Vechatbhai to arrange to shift deceased Mansingbhai in hospital. Thereafter, he went to the house of Harjibhai and Limsingbhai, and both were informed about the incident. Thereafter, all the three started to go to village Jasuni on a motorcycle. On reaching at village Jasuni, they found that deceased Mansingbhai was lying in a cot and was groaning in pain. They asked to Mansingbhai that what had happened. Mansingbhai had replied that his brothers-in-law and mother-in-law had beaten him. He stated names of his brothers-in-law. Thereafter they attempted to shift Mansingbhai in hospital and in the meantime Mansingbhai had died. He went to Jhalod and gave complaint. He stated that complaint at Exh. 21 was the same complaint which he had given. He identified his signature on the complaint and identified the accused. In examination-in-cross, he stated that he could not say when Mansingbhai started from his house to go to village Jasuni. After completion of funeral, etc. he had been to the house of deceased Mansingbhai and asked from his mother and daughter as to about when Mansingbhai started for Jasuni on the day of incident. They replied that in the evening of the incident, one brother-in-law had called Mansingbhai, but they did not give the exact time when Mansingbhai started from his village to go to village Jasuni. Thereafter he stated that he could not say whether anybody possessed tractor or car at village Jasuni. He denied the suggestion that Mansingbhai on enquiring by them, in reply stated that he was beaten by his mother-in-law and brothers-in-law. He denied that Sureshbhai and Gulabbhai did not inform to him about the incident. He denied that when they reached at village Jasuni, Mansingbhai had died. He stated that ordinarily upto 11 or 12'0 clock at night people take their supper. He could not say where Mansingbhai took his supper on the day of incident, and his mother did not say whether Mansing had taken his supper. He denied the allegation that between him and Mansingbhai no conversation took place, but to fabricate false evidence, he deposed like that.

4.2 PW-6 Limsingbhai Mansingbhai Palas stated that at the time of the incident, he was Manager in a mid-day meal scheme. On 13.9.2001, while he was at his house, at about 5.00 a.m. Vechatbhai Mavjibhai and Harjibhai Kaljibhai had been to his house and conveyed that

Mansingbhai was beaten at his in-laws place and that they should go there. Therefore, all the three, in motor cycle went to village Jasuni, and found that Mansingbhai was lying on cot in the courtyard of Bhursing Nanji and on the back side of the house of the appellants. They found that bones of the leg of Mansingbhai were broken and blood was pouring. Mansingbhai was groaning in pain. They asked Mansingbhai about what had happened, and Mansingbhai replied that he was beaten by his four brothers-in-law and mother-in-law. They tried to manage a vehicle. At that time, family members of in-laws of Mansingbhai were also present. They were requested that Mansingbhai should be shifted to hospital as he was their brother-in-law, but they did not help. Thereafter, Mansingbhai became unconscious and died. He identified appellants in the court. He stated that the reason for quarrel was about sister-in-law of deceased Mansingbhai. Deceased Mansingbhai had filed one suit in the court. Wife of deceased Mansingbhai had died and he was to re-marry with sister-in-law, and hence, for that he had filed one civil suit in the court. In his cross-examination distance between his house and the house of the deceased Mansingbhai was asked, which he replied that, it was nearby. He stated that he did not know when Mansingbhai started to go to Jasuni on the day of the incident. He admitted that in his police statement he did not state that Vechatbhai and Harjibhai came to his house for calling him at 5.00 a.m. He stated that whether the case which was pending in the court was filed by Mansingbhai or the opposite party, he could not say. He denied that on account of litigation pending, they had no occasion to visit each other voluntarily. He stated that Mansingbhai was visiting his in-laws frequently. They sent Harjibhai for arranging vehicle and he returned after half an hour. When Harjibhai returned, Mansingbhai had died. He could not say the exact time of returning of Harjibhai. He reiterated that he asked Mansingbhai about what had happened, and he stated that he was beaten and his leg was broken and he was required to be shifted to the hospital. On inquiring that who had beaten him, Mansingbhai had replied to him that his brothers-in-law and mother-in-law had beaten him and stated that he was beaten by sticks. He denied the fact that in his police statement, he did not state names of any brothers-in-law of the deceased Mansingbhai. He denied that he did not visit the place of offence. He admitted that deceased Mansingbhai had happened to be his cousin brother. He denied that when conversation between him and Mansingbhai took place, Harjibhai was present. Even after the incident, he could not know when Mansingbhai started from his village for going to Jasuni.

Some contradictions from his police statement were asked.

4.3 While third witness on this fact examined by the prosecution i.e. P.W.4 Harjibhai Kaljibhai Palas Exh.22, did not support the prosecution case. He stated in his deposition that at the time of incident, he was serving as a teacher in primary school at Jasuni. Incident took place on 12th of September, 2001. On 13th of September, 2001, at about 5.00 a.m. Vechatbhai Mavjibhai Palas had come to his house and stated that Mansingbhai had been beaten at village Jasuni, and they should go there. Thereafter, all the three i.e. himself, Vechatbhai and Limsingbhai went to village Jasuni on a motor cycle. They found that deceased Mansingbhai was lying in a cot and was groaning in pain. There were injuries on his leg. He stated that deceased Mansingbhai did not say that who had beaten him. Thereafter, on motorcycle, he went for arranging vehicle to shift Mansingbhai in the hospital. When he returned, he found that Mansingbhai had died. Learned APP thereafter sought permission to declare the witness hostile and confronted him with his police statement. He denied that Mansingbhai was inquired about what had happened, and deceased Mansingbhai in reply stated to them that his four brothers-in-law and mother-in-law had beaten him with sticks and had broken his left leg. He denied that he had stated this fact in his Police statement.

4.4 Thus, these three witnesses were examined by the prosecution to prove the oral dying declaration of the deceased Mansingbhai.

5. As per the prosecution case, there was one eye witness of the incident, and that was PW-1 Bhursingbhai Nanjibhai Bhedi, who witnessed that appellants and Mansingbhai were quarrelling, and appellants were giving filthy abuses to Mansingbhai. In the meantime, appellant Rupsingbhai Tersingbhai Bhedi attacked Mansingbhai with a stick and to escape, Mansing ran towards southern direction and in the field of this witness. Mansing was apprehended by appellant Rupsing, and Rupsing inflicted injuries on both the legs of deceased Mansing. However, this witness did not support the prosecution case. He stated in his deposition at Exh. 10 before the Court that the incident took before one year. At that time, he was at his house along with his wife and his son Gulab. In the morning, he found Mansing of Jitpur village lying on the cot near road of his field. Mansing was their family son-in-law. Tersingbhai, father-in-law of Mansing, happened to be his brother. Except that, he knew nothing. In examination in cross by learned APP,

the above facts stated by the witness in police statement was confronted, but he denied to have stated anything like that in his police statement. Though in the police statement he stated that the incident took place at about 12'0 clock at night but he denied that facts also.

6. Prosecution examined Mansingbhai Nanjibhai Palas as PW-2 Exh.18, being panch of panchnama of scene of offence, produced at Exh.19. He supported the prosecution case and panchnama and stated that the scene of offence was situated in the field of PW-1 Bhursingbhai Nanjibhai Bhedi, from where the blood was found on the earth, and one piece of blood stained wood, was also recovered by the Police.

7. Dr. Rameshchandra Ramlakhan Zha is examined by prosecution as PW-5 at Exh. 23. He stated that on 14th of September, 2001 he was serving as Medical Officer at PHC Sanjeli, and Police Constable Dalsingbhai Tersingbhai of Jhalod Police Station with a Police Yadi and inquest panchnama, brought dead body of Mansingbhai for postmortem at about 6.30 a.m. At about 7.00 a.m. he started postmortem and found following four external injures:

- (1) A contusion injury over the right ankle joint above the lateral malleolus on outer surface size is 2 inch x 1 inch.
- (2) A contusion over the Rt. arm on anterior surface in lower part. Size is 1 inch x 1 inch.
- (3) A big contusion over the Rt. ankle joint on inner side over the medial malleolus. Size is 4 inches x 3 inches.
- (4) A big contused - lacerated wound over the left leg in middle part on anterior medial surface. Size is 3 inches x 3 inches. Both tibia and fibula bones completely fractured. Distal part freely mobile in all direction. Fracture ends of bones was seen from outside in the wound area.

He stated that bones of legs were extensively found broken on mere touch. The injuries were antemortem. Stomach contained semi digested food, and the food was maize grain. He stated that cause of death was due to haemorrhagic and neurologic shock due to

compound fracture of both tibia and fibula bones of leg on left side. He stated that the deceased might have taken food before one to four hours previous to death. He produced on record the postmortem note at Exh.24. He stated that the injuries could be caused by stick, and due to loss of blood, the death was possible in such kind of injuries. Due to this injury, person may be in condition to speak. In his cross-examination, he stated that the death might have caused during before 20 to 48 hours from the dead body brought before him. He stated that the external injuries were possible by vehicular accident also. He admitted that the injuries received were on vital part of the body, had immediate treatment made available to such person, his life could have been saved, but otherwise, death was possible in such type of injuries within two to four hours. The deceased might have taken food before he received injuries. He stated that on account of loss of blood, possibility of death was there.

8. Last witness that prosecution examined is PW-7 Jayprakash Dayaljibhai Sutriya at Exh.27. In chief-examination, he stated that Exh. 21 complaint was recorded before him. He draw panchnama and recorded the statements of some witnesses, and filed charge-sheet. In his cross-examination, he stated that in his investigation, the fact came out that the incident took place at about 11.30 hours at night. He stated that Sanjeli outpost was nearer than Jhalod Police Station. In Sanjeli outpost also, complaints were recorded. From Jhalod Police Station to Sanjeli Outpost, on motorcycle, it takes only 15 minutes. He stated that when he visited the place of offence, he found that dead body of Mansing was lying on cot. Some contradictions of the witnesses were proved in his evidence.

9. Thus, this is all the evidence of the prosecution case. The learned Trial Judge came to the conclusion that the prosecution proved beyond doubt that the death caused was culpable homicide, and he further came to the conclusion that the medical opinion for fixing the time of the incident and time of death was not sufficient, and that only because semi digested food was found in stomach of the deceased, no conclusion could be arrived at that the incident had taken place only 4 to 5 hours before 7.00 a.m. as argued by the defence. After appreciating the evidence of two witnesses i.e. PW-3 Vechatbhai Palas and PW-6 Limsingbhai Mansingbhai Palas, learned Trial Judge came to the conclusion that both the witnesses were reliable witnesses, and oral dying declaration made before them by the deceased, should be acted upon. He

ruled out the possibility shown by the defence that when Vechatbhai, etc. reached at the scene of offence, deceased Mansingbhai had already died, could not be believed. There are no contradictions in the evidence of these two witnesses, according to the learned Trial Judge, and therefore, their evidence was found credible by the learned Trial Judge. The Trial Judge also took into consideration that it is established fact that deceased was found lying on cot near the house of the accused. Learned Trial Judge while rejecting the argument of the defence about late filing of FIR, observed that in the facts and circumstances of this case, six hours delay in filing the First Information Report, is not that delay, which would require to be explained by the prosecution. Even, according to learned Judge, one hostile witness, out of three, before whom, oral Dying Declaration was made by the deceased, witness Harjibhai Kaljibhai has supported the prosecution case to the extent that when they reached at the place of offence at about 7.00 a.m. the deceased was alive. Therefore, after relying on the oral dying declaration, the learned Trial Judge found the appellants guilty for the incident, but the learned Trial Judge further came to the conclusion that there were no injuries on vital part of body, and that injuries were caused by weapon like sticks and, therefore, there was no required intention on the part of the appellants to cause death of the deceased, and hence the case squarely was falling within the scope of Section 304 Part-II of the Indian Penal Code, and hence, after convicting the appellants for the offence under Section 304 Part-II, instead of Section 302 of IPC, the learned Trial Judge sentenced each of the appellants as above said.

10. This court has undertaken a complete and comprehensive appreciation of all vital features of the case, and the entire evidence on record with reference to broad and reasonable probabilities of the case. It is pertinent to note at this juncture that, only eye witness of the prosecution, did not support and, therefore, the prosecution case hinges on oral dying declaration of deceased as deposed, by two above said witnesses.

11. Dying declaration under Section 32(1) of the Indian Evidence Act, 1872 is an exception to the general rule that hearsay evidence is not admissible evidence, unless evidence is tested by cross-examination. Under Section 32 where a statement is made by the person as to the cause of death or as to any of the circumstances, which resulted in his death and when cause of death or that person's death comes into question, such a

statement, oral or in writing made by the deceased to the witness, is a relevant fact and is admissible in evidence. Undoubtedly, it is well settled that conviction can be based on the dying declaration itself if it is found satisfactory and reliable by a court, but at the same time, if there are any important infirmities in the dying declaration or the facts surrounded such evidence, warranting further assurance then the courts have to look for corroboration. Otherwise, the dying declaration if satisfies judicial conscience, requires no corroboration. The rule of corroboration requires that the dying declaration be subject to close scrutiny since the evidence is not tested by cross-examination. Any evidence adduced for the purpose of proving dying declaration has to be weighed independently and through the anvil of thorough scrutiny. Following three aspects must be examined more carefully while appreciating the evidence in respect of dying declaration (i) was the victim in condition and fitness to make any statement, (ii) whether version narrated by the victim is intrinsically sound and accords with probabilities, and (iii) whether any evidence led by prosecution to prove dying declaration, especially in case like this, of oral dying declaration, is worthy of acceptance.

12. So far as the fact of this case is concerned, the material evidence i.e. oral dying declaration, will require close scrutiny. After appreciating the evidence, this Court would be required to arrive at an independent conclusion as to whether the evidence produced during trial can be relied upon or not, and that, whether case against the appellant could be proved during trial beyond reasonable doubt on the evidence adduced. The credibility of a witness has to be adjudged in drawing inferences from proved and admitted facts emerging from record. Thus, after independent scrutiny of evidence, objective satisfaction has to be reached affirmatively that the case of prosecution was substantially true or not, and whether the guilt of the accused was proved beyond doubt during trial especially when the accused are charged of severe offence like murder. It becomes imperative that judicial approach in dealing with such cases must be very cautious, circumspect and careful before convicting the accused by the Trial Court and while upholding such conviction, the appellate court has to consider the matter carefully and examine all the relevant material circumstances of the case.

13. Therefore, it is necessary first to mention the contentions raised on behalf of the appellants as well as the State.

14. Learned counsel Mr. Anandjiwala for the appellant very vehemently urged that both the king pin witnesses of the prosecution i.e. PW-3 Vechatbhai Mavjibhai Palas and PW-6 Limsingbhai Mansingbhai Palas, before whom an oral dying declaration was made by the deceased, were near relatives of the deceased and, therefore, their evidence is required to be carefully scrutinised. A fact must be taken into consideration, according to learned counsel for the appellants that out of three witnesses, one witness i.e. PW-4 Harjibhai Kaljibhai Palas, though stated that when they reached at the place of offence, the deceased was living, did not support the prosecution case about dying declaration having made by the deceased before this witness. According to learned counsel, this must be the truth. My attention was drawn to the evidence of PW-5 Dr. Rameschandra Ramlakhan Zha, who found semi digested food during postmortem in the stomach of the deceased. Mr. Anandjiwala stated that semi digested food in stomach indicates that the deceased might have taken some food before four to five hours of death. If time of death is fixed at 7.00 a.m. then it goes to suggest that he might have taken his last food at about 2.30 during night, which is not probable. According to learned Advocate Mr. Anandjiwala, therefore, the witnesses when they stated that they found deceased Mansing in living condition, and in position to make statement, cannot be believed for the simple reason that deceased might have taken his last food latest at 10.00 to 11.00 O'clock at night, and he might have died 4 to 5 hours thereafter. Meaning thereby that when PW-3 Vechatbhai Mavjibhai Palas, PW-6 Limsingbhai Mansingbhai Palas and PW-4 Harjibhai Kaljibhai Palas reached at village Jasuni, Mansing had already died, the question of having made any oral dying declaration before these witnesses does not arise.

15. My attention was also drawn to the deposition of the Investigating Officer, PW-7 Jayprakash Dayaljibhai Sutriya, wherein he admitted that in investigation, it was emerged that the deceased might have received injuries at 11.00 O'clock in the night. My attention was again drawn to the deposition of Doctor wherein he stated that ordinarily, in such type of injuries if minimum treatment is not available to the injured, he was likely to die within three to five hours. Therefore, it is contended that the evidence of these witnesses appears not to be acceptable on account of two views possible through the evidence of prosecution witnesses. It was also contended that it is on record that some litigations were going on between deceased Mansing and his in-laws

and some copies of the complaints are produced on record by the Investigating Officer. In his evidence, it is also revealed that civil litigation in shape of suit was also pending. In such circumstances, according to learned Advocate for the appellants, it was not probable that deceased would visit village Jasuni. According to learned Advocate, it was stated in cross-examination, it was suggested that deceased was injured in some vehicular accident and was brought in the field of PW-1 Bhursingbhai Nanjibhai Bhedi, but when PW-4 Harjibhai Kaljibhai Palas and PW-6 Limsingbhai Mansingbhai Palas reached at the place of offence, the deceased had already died. It was urged that the evidence of the prosecution create doubts which must be resolved in favour of appellants.

16. On the other hand learned APP Mr. Jani draw my attention to some conclusions of learned Trial Judge as to credibility of witnesses. It was urged that though witnesses before whom oral dying declaration was made by the deceased as well to be relative of the deceased, but their evidence cannot be thrown out only because of this reason. Even PW-4 Harjibhai Kaljibhai Palas, who has not supported the prosecution case, fully stated in his deposition that when PW-3 Vechatbhai Mavjibhai Palas and PW-6 Limsingbhai Mansingbhai Palas reached at the place of offence, deceased was living. It is urged that, if this be true, no fault can be found in the evidence of prosecution that deceased made oral dying declaration before PW-3 Vechatbhai Mavjibhai and PW-6 Limsingbhai Mansingbhai. In their cross-examination, no such contradictions were brought as to disbelieve their testimony. It was urged that though the exact time of death is not established by the prosecution, the trial court rightly rejected the defence version based on medical evidence as to point out semi digested food in stomach of the deceased that the incident might have occurred before four to five hours of 7.00 a.m. My attention was also drawn that medical expert i.e. PW-5 Dr. Rameshchandra Ramlakhan Zha stated in his deposition that with such injuries, person may properly speak. Learned APP supported vehemently the judgment and order of the trial court convicting the appellants under Section-304 Part-II of the IPC. It was urged that the learned Trial Judge came to the conclusion through sound reasoning and, therefore, no interference at all is required in the judgment and order impugned, and the Appeal is required to be dismissed.

17. Having heard learned counsels of the parties, and appreciating the evidence very carefully, the prime

question which arises in this case after appreciating the evidence is, when the so called incident took place. This is very material because the evidence which is on record, is not that clear as to when the incident took place. Resultant effect of the time of the incident would affect acceptability of the evidence of two witnesses, on whose evidence, the whole prosecution case hinges. Whether the oral dying declaration made by the deceased before these two witnesses, is acceptable or not, depends upon surrounding circumstances, one of them which is prime importance, is the probable time of happening of the incident. It is pertinent to note that in medical evidence, while conducting postmortem, PW-5 Dr. Rameshchandra Ramlakhan found semi digested food. Trial Court is correct in its conclusion that from this medical evidence and opinion, probable time of happening of the incident could not be ascertained. The fact that the deceased was living upto 7.00 a.m. on the day of incident, and made oral statement before two witnesses, depends upon the time of incident. In this respect at least the medical evidence led by the prosecution through PW-5 Dr. Rameshchandra Ramlakhan Zha can be relied upon to the extent that in such type of injuries, if treatment is not available, the injured is likely to die within four to five hours.

18. Therefore, the say of PW-3 Vechatbhai Mavjibhai Palas and PW-6 Limsingbhai Mansingbhai Palas, as to oral dying declaration of the deceased, has to be scrutinised with very important circumstance that when the incident occurred. If the medical evidence is relied upon and if the say of the witnesses i.e. PW-3 Vechatbhai and PW-6 Limsingbhai, is taken into consideration that the deceased was living upto 7.00 a.m. on the day of incident, then the incident might have occurred at 2'0 clock or 3'0 clock at night of 12th of September, 2001 or early hours of 13th of September, 2001. when First Information Report in the form of Section 154 of the Criminal Procedure Code, which is sent to the Magistrate, is perused from the record, it is found that the time of the incident is narrated as any time between night 12th of September, 2001 and 13th of September, 2001. There is no clear evidence on behalf of the prosecution in this regard. It is well to remember that PW-6 Limsingbhai as well as PW-3 Vechatbhai, both are related witnesses to the deceased. It must also be borne in mind that it has come in the evidence that between deceased and his in-laws, there were serious dispute as to second marriage of the deceased with Kokilaben, sister of deceased wife of deceased Mansing. Criminal complaints were filed, which are placed on record through Investigating Officer.

Both the witnesses PW-3 Vechatbhai Mavjibhai Palas and PW-6 Limsingbhai Mansingbhai Palas admitted that there were civil litigations pending between the parties about likely marriage of deceased with Kokilaben.

19. The probable time of the happening of the incident is yet relevant to arrive at the crucial decision as to what was the fitness, physical as well as mental of the deceased, to make statement at 7.00 a.m. on the day of incident before these two witnesses though the medical opinion in the shape of evidence indicated that a person with such injuries, can properly speak, but when it is to be taken into consideration that such injured dies within 4 to 5 hours, then again, it becomes absolutely necessary to establish by the prosecution that when the incident occurred.

20. Considering the evidence of PW-3 Vechatbhai Mavjibhai and PW-6 Limsingbhai Mansingbhai, related witnesses of deceased, and considering the fact that the dispute between the parties is double edged weapon, as to involve the appellants falsely, and also to come to a conclusion that there was enmity between in-laws and the deceased, it was utmost necessary for the prosecution to prove beyond reasonable doubt the probable time of occurrence of the incident. No such cogent evidence is found from the deposition of witnesses nor from the documentary evidence. It is, therefore, necessary to look at the evidence of Investigating Officer PW-7 Jayprakash Dayaljibhai Sutriya, who in his examination in cross, in para-5, in unequivocal terms, admitted that in his investigation, the fact emerged that the incident occurred at 11.30 on the night of 12th of September, 2001. PW-7 Jayprakash Sutriya, Investigating Officer, is an independent witness. He has no reason to state something that is not on the record or to favour the accused or to favour the witnesses. In cross-examination, Vechatbhai has stated that on inquiry after the death of Mansingbhai from mother and daughter of Mansingbhai, he knew that Mansingbhai was summoned by his brother-in-law in the evening of 12th of September, 2001. If the fact is taken into consideration about probable time of occurrence of incident, as stated by independent witness i.e. Investigating Officer, and if the facts stated by witness Vechatbhai in cross-examination is taken into consideration, it necessarily indicate that the incident might have occurred between about 11.30 and 12.00 at night, though it was the duty of the prosecution to prove the date and time of incident, but the prosecution failed in its duty. On appreciating the evidence, probability indicates that

incident might have occurred at 11.30 to 12.00 midnight on 12th of September, 2001. If this fact is taken into consideration, then the evidence of PW-3 Vechatbhai Mavjibhai Palas and PW-6 Limsingbhai Mansingbhai Palas becomes doubtful because at 7.00 a.m. when they reached at the place of offence, deceased Mansing might have died. Therefore, the fact that the deceased made any oral dying declaration before the two witnesses becomes doubtful for its acceptance. These are two views possible in respect of occurrence of the incident. Investigating Officer categorically stated that incident occurred at 11.30 night on 12th of September, 2001. First Information Report is vague to the extent that it does not indicate even probable time of occurrence of incident. None of other witness examined by the prosecution throws light in this aspect. It is important to note that two persons - Sureshbhai Varsing Bhedi and Gulabbhai Bhursing who informed PW-3 Vechatbhai Mavjibhai about the incident, are not examined by the prosecution. If the incident had occurred, according to whatever evidence is available, at about 11.30 to 12.00 at midnight, then it is improbable that in the morning on 13th of September, 2001, after six to seven hours of the occurrence, with the injuries the deceased had, deceased was alive to make any oral statement before these witnesses. This is one view emerging from the evidence of prosecution itself. The second view is whatever PW-3 Vechatbhai and PW-6 Limsingbhai have stated in their depositions. Out of these two views, when the whole evidence in totality is scanned through the anvil of judicial scrutiny, then the probable view is the incident occurred at 11.30 on the night of 12th of September, 2001. This probability renders the evidence of PW-3 Vechatbhai Mavjibhai and PW-6 Limsingbhai Mansingbhai doubtful in respect of deceased being alive at 7.00 a.m. in the morning of 13th of September, 2001, and as to have made any statement before these two witnesses. Ordinarily out of two views possible, a view in favour of the accused is required to be accepted. This is so because in our administration of criminal justice system an accused is presumed to be innocent unless such presumption is rebutted by the prosecution by producing the evidence to show the accused to be guilty of the offence with which he is charged. When two views are possible on the evidence produced in the case, one indicating the guilt of the accused and the other to his innocence, the view favourable to the accused is to be accepted. Even in cases where the court entertains reasonable doubt regarding guilt of the accused, the benefit of such doubt should go in favour of the accused. It is necessary that the case of the prosecution must be

judged as a whole having regard to the totality of the evidence. In reaching the conclusion about guilt of the accused, the court has to appreciate, analyze and assess the evidence placed before it by the yardstick of probabilities, its intrinsic value and the animus of witnesses with the accused. In the present case, in absence of probable time of occurrence of incident, which was required to be proved by the prosecution beyond reasonable doubt, the evidence of PW-3 Vechatbhai Mavjibhai Palas and PW-6 Limsingbhai Mansingbhai Palas becomes unacceptable. The say of the Investigating Officer as to the time of occurrence of the incident and other evidence when appreciated in totality, creates reasonable doubt as to veracity and truthfulness of these two witnesses in respect of oral dying declaration made before them by the deceased. This is again crucial because at one stretch both the witnesses say that the deceased was groaning in pain and was suffering extremely due to injuries, then the fitness, physical as well as mental of the maker of dying declaration also would not said to have been established by the prosecution beyond reasonable doubt.

21. It must be noted that only because there are no material contradictions in the evidence of witnesses, the whole evidence automatically does not become acceptable. The evidence has to be judged from all possible corners to come to a conclusion as to the guilt or otherwise of the accused. This is so because the mere fact that the witnesses are consistent in what they say is not a sure guarantee that they are truthful. After taking into consideration the totality of the circumstances, it can be said that a particular witness is creditworthy or not. Weighing the evidence of such witness on the anvil of probability of human conduct and natural probabilities, when it strikes the judicial conscious that a particular witness is creditworthy, then there may not be any hesitation in accepting his evidence. If the other probable circumstances of the prosecution case makes the evidence of a particular witness doubtful, then even the witness may be consistent in their say, their evidence becomes doubtful. In this case, as above said, firstly, both the witnesses were related to the deceased. They knew that there was sharp enmity between deceased on one side and his in-laws on the other. The issue of conflict was delicate in respect of marriage of Kokilaben with the deceased. On receiving information PW-3 Vechatbhai, PW-4 Harjibhai and PW-6 Limsingbhai might have visited the scene of offence, but it is difficult to believe that at that juncture of time, the deceased was alive. As discussed above, at least, that fact creates reasonable

doubtful, but finding the accused near the house of his in-laws in severely beaten condition and on the background of enmity between the parties, might have prompted relations to depose before the court that the deceased made oral dying declaration before them. This fact is still required to be examined from yet more angle, and that is filing of First Information Report. Undoubtedly, PW-3 Vechatbhai, PW-4 Harjibhai and PW-6 Limsingbhai, reached at the place of offence at 7.00 a.m. First Information Report came to be filed by PW-3 Vechatbhai at Jhalod Police Station at about 13.30 hours which is 45 kms from where the deceased was lying, but there is an Outpost near of that place as deposed by the Investigating Officer. The learned Trial Judge resolved this issue by conclusion that in the circumstances of the case, delay of six hours in filing the First Information Report could not be said to be delay, vitiating the prosecution case.

22. It remains though established fact that the filing of First Information Report by six hours late, no explanation is coming forth from prosecution witnesses. It must be borne in mind that the fact alone that six hours delay in filing First Information Report, may not be fatal to the prosecution case, but when the evidence of witnesses becomes doubtful, and when no explanation, whatsoever, is coming forth for even six hours delay, in totality of the circumstances even filing of late First Information Report by PW-3 Vechatbhai, casts doubt in prosecution case. The totality of the circumstances, therefore, indicates that benefit of reasonable doubt must go in favour of the appellants when case of the prosecution hinges only oral dying declaration, and the evidence of witnesses before whom such dying declaration alleged to have been made by the deceased becomes doubtful as above said.

23. In similar facts of the case, in the matter of ARAVIND SINGH vs. STATE OF BIHAR, as reported in 2001 (6) SCC 407, the Supreme Court in paras 17 and 18 observed as under :

17. Be it noted that the dying declaration herein has not been effected before any doctor or any independent witness but to the mother who is said to have arrived at the place only in the morning - the mother admittedly is an interested witness; though that by itself would not discredit the evidence tendered in court but the fact remains that the doctor's evidence considering the nature of the burns posed a

considerable doubt as to whether such a statement could be made half-an-hour before the death of the accused. It is not that the statement of the unfortunate girl was otherwise not clear or there was existing some doubt so as to the exact words, on the contrary the definite evidence tendered is that there is clear unequivocal statement from the daughter of the family that the conjoint efforts of pouring kerosene thereafter with a lighted match stick has resulted in the burn injury. The severity of the burn injury and its impact on the body speaks volumes by reason of the death of the deceased. It is the reliance on such a dying declaration by the High Court which shall thus have to be scrutinized with a certain degree of caution.

18. The dying declaration in the instant matter, thus we must confess, raised a certain amount of eyebrows and Mr. Verma also with his usual eloquence did put a strong protest in regard thereto. The evidence of this declaration depicts that just before a few minutes of her death, the deceased would make a declaration quietly to the mother naming therein all the three relations along with the husband who poured kerosene to burn her alive. This is not acceptable, more so having regard to the declaration being made to the mother only. In any event, is it conceivable that the husband along with the father-in-law, mother-in-law, brother-in-law would start pouring kerosene together on to the girl - as if each was prepared with a can of kerosene to pour simultaneously this not only would lead to an absurdity but reliance on such a vague statement would be opposed to the basic tenets of law. Further, it is in evidence that the deceased had extensive burns including on her mouth, nose and lips - if any credence is to be allowed to the same, then and in that event, the evidence of the mother about the confession stands belied by itself. Significantly, the doctor's evidence as is available on record would also go a long way in the unacceptability of the evidence of the mother as regards confession. In no uncertain terms the doctor PW 8 stated that the death may have taken place at once and within ten seconds by reason of the extensive nature of the burns and the deceased could not have survived beyond 10 minutes."

24. It may also be noted that in latter decision, in the matter of LAXMAN vs. STATE OF MAHARASHTRA, as reported in 2002 (6) SCC 710 Apex Court ruled that certificate of a Doctor as to mental fitness of the maker is not sine qua non. But the law remains unchanged to the extent that prosecution must prove that maker of Dying Declaration was in fit mental condition to make declaration. This can be inferred from other evidence available from record. Thus in this case also the prime question which arises that whether the prosecution proved beyond doubt that deceased was in fact in fit condition to make the statement before the witnesses. Such dying declaration shall have to be dealt with care and caution and corroboration thereof, though not essential as such, but is otherwise expedient to have the same in order to strengthen the evidentiary value of the declaration. Independent witnesses may not be available but care and caution is required while accepting a statement of related witnesses to be trustworthy of evidence. Therefore, it would be unsafe in the facts and circumstances to accept the evidence of PW-3 Vechatbhai Mavjibhai Palas and PW-6 Limsingbhai Mansingbhai Palas without any corroboration, firstly as to whether the deceased was alive at 7.00 a.m. on 13th of September, 2001, and secondly whether the deceased was in fit condition to offer any statement in view of the same witnesses stated that the deceased was in extreme grief and was groaning in pain and that he died soon after impugned statement. The fact that Investigating Officer stated that the incident occurred at 11.30 p.m. at night, the fact that PW-5 Doctor stated that in such injuries if treatment is not available to injured, he is likely to die within 4 to 5 hours, are the circumstances further creating doubt about the truthfulness of above two witnesses.

25. In above view of the matter learned Trial Judge failed to consider very important aspect of the prosecution case as to when the incident occurred and what were the resultant effects on the prosecution evidence. The Trial Court fell in error because it considered only aspect of consistency of witnesses without putting such evidence on the anvil of other circumstances of prosecution case and probabilities of human conduct and realities of life. The reasons, therefore, offered by the learned Trial Judge to convict the appellants even for the offence under Section 304 Part-II cannot be countenanced for the above said reasons. This Appeal, therefore, is required to be allowed.

26. In the result, this Appeal is allowed. Judgment and order delivered by learned Joint District Judge and Additional Sessions Judge, Second Fast Track Court, Panchmahal at Dahod, on 30th January, 2003 in Sessions Case No.77 of 2002, convicting of the appellants for the offence punishable under Section 304 Part-II IPC and sentencing each of them is set aside and each of the appellants are ordered to be acquitted of the charges levelled against them in Sessions Case No.77/2002. Mudammal to be disposed of as directed by learned Trial Judge. Vide order dated 14th of February, 2003 of this Court, appellant No.2 Bharatbhai Tersingbhai Bhedi, appellant No.3 Prabhatsinh Tersingbhai Bhedi, appellant No.4 Laxmanbhai Tersingbhai Bhedi, and appellant No.5 Hakliben W/o Tersing Manjibhai Bhedi are released on bail and, therefore, bail bonds of each of appellants No. 2 to 5 stands cancelled, while appellant No.1 Rupsingbhai Tersingbhai Bhedi is in jail and it is directed that appellant No.1 Rupsingbhai Tersingbhai Bhedi be released from the jail forthwith if he is not required to be detained in jail for any other purpose.

(J.R. Vora, J.)